

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
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No 47384-4-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

City of Puyallup,

Plaintiff/Appellant,

v.

William E. Spenser, Sr.,

Defendant/Respondent

SPENSER'S RESPONSE BRIEF

Michael G. Bejarano
Attorney for Respondent
WSBA Number 25008
1020 "A" St. SE, Ste. 7
Auburn, WA 98002
Telephone: 253-735-3997
Facsimile: 253-735-1210

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A. ARGUMENT

A statement of the issues and statement of the case have not been provided as Spencer is satisfied with the statement provided by Puyallup. Spenser adopts the below referenced authority and argument presented by his RALJ Appeal Counsel Timothy A. Jenkins, at RALJ Appeal. The following arguments are drawn directly from Spencer's RALJ Appeal, which was produced and argued by Timothy A. Jenkins, WSBA #15584.

1. DID THE COURT ERR IN ALLOWING THE PROSECUTOR TO PRESENT THE ACTUAL BAC READING TO THE JURY IN OPENING STATEMENT PRIOR TO THE FOUNDATIONAL ELEMENTS FOR ADMISSIBILITY BEING PRESENTED IN EVIDENCE? SHOULD THIS HAVE RESULTED IN A MISTRIAL?

A court's ruling in regard to statements made by the prosecutor to the jury is review for abuse of discretion and entitled to some deference. State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997). The purpose of an opening statement in a criminal case is to generally outline evidence to be presented to the jury by the prosecution and defense. Arguments about the case are not proper. Certainly reference to any evidence which has not been admitted by the court and on which there may be a significant question to whether such will be admitted should be done very carefully. In the instant case, the ultimate question for the jury was to decide whether the defendant was under the influence or affected by alcohol while driving

a motor vehicle. Significant foundational hurdles must be met by the prosecution before they can submit BAC test results in evidence. In the instant case the prosecutor, when outlining the expected evidence, directly stated the BAC test results in her opening statement. See Transcript at page 32, line 8. The defense immediately objected and requested a sidebar conference and moved for a mistrial. Defense also requested a curative instruction if the Court was going to overrule the objection. At the sidebar conference, the court decided to consider the issue later, outside the presence of the jurors, and allowed the prosecution to continue with opening statement without a ruling on the objection, the motion for mistrial, or a curative instruction. See Transcript at page 32, line 12. Later reference was made to the mistrial motion after the jury had been excused for lunch. See Transcript at page 37, line 37. The court states, "Um. I denied the defense motion at that time on the basis that I had just finished advising the jury, going through the jury instructions and letting them know that the statements and remarks of counsel are not evidence." The court went on to state, "But I would reserve ruling on that until a recess to give everyone an opportunity to research that particular issue." Transcript at page 37, line 17. The parties argued this issue after the lunch recess. See Transcript at page 38 through 40. The court, after hearing arguments about the prejudice to the defense and how the prosecutor said

that it was not prejudicial, determined, "... and I am going to rule that the foundation should be laid before the result of the test is introduced to the jury. However, I don't believe that the statement rises to the level of mistrial." See Transcript at page 39, line 24.

2. IF THE APPEAL COURT FINDS SUCH TO BE ERROR, DOES THE TRIAL COURT'S FAILURE TO CORRECT SUCH ERROR BY A LIMITING INSTRUCTION CONSTITUTE A BASIS FOR REVERSAL AND A NEW TRIAL?

Referencing the court's decision regarding the error made by the City in the opening statement, it is clear that the court felt the prosecutor's statement should not have been made to the jury. As such, the defense asserted that at sidebar that at the minimum a curative instruction should have been given at the time of the error. It was not. Further, it is hard to imagine information in a DUI trial that impacts the defendant more than the breath test results. Essentially the prosecution has been told, don't do that again. That does not correct the error as it affected "this defendant's" constitutional right to a fair trial. The defense asserts that the error was of such magnitude that the request for a mistrial should have been granted. Almost all citizens would know from common experience that the state level of intoxication is .08. To start at the beginning of the trial and have the prosecutor state the BAC level to the jury triggering a vigorous defense objection, and then have the court make no record of the propriety

of the objection certainly has a direct effect upon the fairness of the trial. It takes little imagination to believe that a juror hearing this information could speculate as to “why they are necessary in this case”. The failure of the court to address this issue directly to the jury when it found the statement to be improper rises to an abuse of discretion by the trial court. As such, the defense requests that this court remand this matter for a new trial.

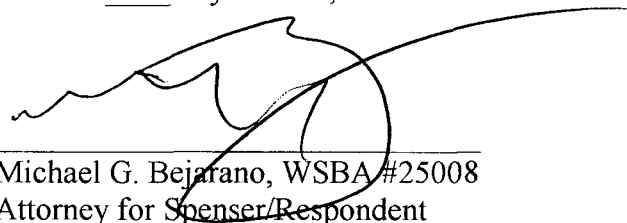
3. ADOPTION OF OTHER ARGUMENT

Spencer also adopts argument of RALJ counsel as presented in “Defense Request to Deny Motion to Reconsider/Confirm Remand” which has been presented to the Court by Puyallup.

B. CONCLUSION

The RALJ Court concluded that once a jury hears BAC results in opening, it could not easily ignore the results, or put the aside, even with the benefit of a curative jury instruction. Spenser respectfully requests this Court to uphold the RALJ Court ruling, and to remand this case to lower court for further proceedings.

RESPECTFULLY SUBMITTED this 23 day of June, 2015.



Michael G. Bejarano, WSBA #25008
Attorney for Spenser/Respondent

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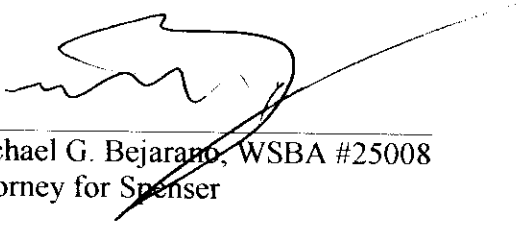
William E. Spenser, Sr.,

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DECLARATION OF SERVICE OF
SPENSER'S RESPONSE BRIEF

MICHAEL G. BEJARANO declares under penalty of perjury
under the laws of the State of Washington that I electronically served the
above-mentioned brief upon Terra Evans, at tdevans@ci.puyallup.wa.us.

DATED this 3 day of July, 2015, at Auburn, WA.



Michael G. Bejarano, WSBA #25008
Attorney for Spenser